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RECORD, CASE No. 14,277.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 869.

THE SOUTHERN KANSAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JEREMIAH S. BRISCOE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

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1 In the District Court of the United States for the Western District of Arkansas.

JEREMIAH S. BRISCOE, Plaintiff,
vs.
SOUTHERN KANSAS RAILWAY COMPANY, Def't.

The plaintiff, complaining of the defendant, says that the defendant is a corporation duly organized under the laws of the State of Kansas; that the defendant owns and opperates a line of railroad through the Indian Territory from a point on the northern boundary near Winfield, Kansas, to a point on the southern — thereof near the mouth of the Washita river.

That all trains of cars, both passenger and freight trains, run upon said line of railroad are owned and opperated by the defendant and manned by the defendant's servants & employés.

That the plaintiff is an inhabitant of the Chickasaw nation, Indian Territory, living at Purcell, in said nation, which is on the line of defendant's railroad.

That on the 26th day of June, 1888, a train of cars on defendant's railroad did, in the Chickasaw nation, Indian Territory, which is within the western district of Arkansas, run into and kill three head of horses belonging to plaintiff; that on the 10th day of July, 1888, a train of cars on defendant's railroad did, in the said Chickasaw nation, run into and kill and cripple six head of horses belonging to plaintiff, and did at other times during said year kill one heiffer and one hog belonging to defendant; that the above-mentioned stock was killed and crippled without fault or negli-
2 gence on part of the plaintiff, but that said crippling was caused by the careless, negligent, and unskillful management and conduct of defendant's servants; that by reason of such careless, negligent, and impropper conduct of defendant's servants the plaintiff has lost the value of said stock and been deprived of the service ther-of, to his damage in the sum of fifteen hundred dollars.

Whereupon plaintiff praves judgement against defendant in the sum of fifteen hundred dollars, and for his costs and for other relief.

BARNES, MELLETTE & BOUDINOT,
Att'ys for Plaintiff.

Wm. M. Mellette, being duly sworn, states that the plaintiff is a non-resident of the State of Arkansas; that the matters alleged in the foregoing complaint are true as he believes.

W. M. MELLETTE.

Sworn to and subscribed to before me this 2nd day of Nov., 1888.

STEPHEN WHEELER, *Clerk.*

Filed Oct. 18th, 1888.

STEPHEN WHEELER, *Clerk.*

1—869

3 In the District Court of the United States for the Western District of Arkansas.

JEREMIAH S. BRISCOE, Plaintiff,
against
SOUTHERN KANSAS RAILWAY COMPANY, Def't. } Answer.

The defendant, The Southern Kansas Railway Company, for answer to the plaintiff's complaint, says:

1. That said defendant denies that the train of cars of the defendant railroad, by reason of the careless, negligent, and unskillful management and conduct of defendant's servants, on 26th day of June, A. D. 1888, in the Chickasaw nation, or at any other time or place within the district aforesaid, run into and killed three head of horses belonging to the plaintiff without the plaintiff's fault or negligence, in manner and form alleged and set forth in said complaint.

2. The defendant, further answering, denies that the train of cars of defendant's railroad, by reason of the careless, negligent, and unskillful management and conduct of defendant's servants, on 10th day of July, 1888, in the said Chickasaw nation, or at any time and place within the jurisdiction of this court, run into and killed and crippled four head of horses, one heifer, and one hog belonging to the plaintiff, without the fault and negligence of the plaintiff, in manner and form as alleged in said complaint.

3. The defendant, further answering, denies that by reason of the careless, negligent, and improper conduct of the defendant's servants the said plaintiff lost in value of the stock aforesaid and deprived him of their services, to the plaintiff's damage of fifteen hundred dollars or any other amount; and the defendant further says

4 the plaintiff's own negligence and car-lessness contributed to whatever injuries he may have sustained in the premises.

DU VAL AND CRAVENS,
For Defendant.

Ben. T. Du Val says that he believes the foregoing answer to be true; that he is one of the attorneys of the defendant, and that it is not in the western district of Arkansas.

BEN'M. T. DU VAL.

Sworn to in open court this 7th day of Dec., 1888.

STEPHEN WHEELER, *Clerk*,
By I. M. DODGE, *D. C.*

Filed Dec. 7th, 1888.

STEPHEN WHEELER, *Clerk*,
By I. M. DODGE, *D. C.*

The defendant, for further and ad-itional answer to the plaintiff's complaint, says that it is not true, as alleged in the said complaint, that all the trains of cars, both passenger and freight trains, or any of them, which were run upon said line of railroad were owned and operated by the defendant and were manned by the defendant's servants and employés, at the Chickasaw nation, at the time

and in manner and form as is alleged and set forth; and further says that the defendant did not run and operate said line of railroad in the Chickasaw nation, but the same was leased to the Atchinson, Topeka & Santa Fé railroad long before the alleged killing of said stock.

W. P. HACKNEY.
DU VAL & CRAVENS.

W. P. Hackney, one of the solicitors of said defendant, says the matters and things in the foregoing answer are true, and that the said defendant is now absent from this district.

W. P. HACKNEY.

Subscribed and sworn to before me this 13th day of June, '89.
STEPHEN WHEELER, *Clerk*,
By I. M. DODGE, *D. C.*

Filed June 13th, 1889.

5 In the Circuit Court of the U. S. for the Western District of Ark., May Term, 1889.

THURSDAY MORNING, 9 O'CLOCK, *June 13th*, 1889.

Court met pursuant to adjournment.

Present: The Hon. Isaac C. Parker, judge of the district court of the United States in and for the western district of Arkansas.

JEREMIAH S. BRISCOE
vs.
SOUTHERN KANSAS RAILWAY CO. } Complaint at Law. No. 403.

On this day come the defendant-, by their attorneys, Mess. Du Val and Cravens and William P. Hackney, and file motion to suppress the deposition of Peter Jamison, filed May 16th, 1889.

Said motion coming on to be heard, *and* the court, after being well and sufficiently advised in the premises, doth overrule said motion.

On this day come the plaintiff, by his attorneys, Mess. Barnes, Mellette and Boudinot, and come the defendant-, by their attorneys, Mess. Du Val and Cravens and William P. Hackney, and, both parties having announced themselves ready for trial, it is ordered that a jury come to try the issue joined; whereupon the following were selected for the trial of this cause, to wit, Albert Tinker, Wm. Joshenberger, Henry St. Clair, Samuel M. Fisher, Richmond W. Gorden, Chas. Ahrens, Henry C. Haney, Hiram Chism, Robert Harris, Charles Bracht, John Ulmer, James R. Blunt, twelve good and lawful men of the western district of Arkansas, duly selected empannelled, and sworn to try the issue joined and a true verdict render according to the law and the evidence; and, after hearing the evidence and there not being time to further progress in the trial of this cause, they were permitted to seperate, under the instructions of the court, until to morrow morning at 8½ o'clock.

6 FRIDAY MORNING, *June 14th*, 1889.

On this day come the plaintiff, by his attorneys, Mess. Barnes, Mellette and Boudinot, and comt the defendant-, by their attorneys, Mess. Du Val and Cravens and Wm. P. Hackney, and now come the jury heretofore empannelled for the trial of this cause, Albert Tinker, Wm. Joshenberger, Henry St. Clair, Samuel M. Fisher, Richmond W. Gorden, Chas. Ahrens, Henry C. Haney, Hiram Chism, Robert Harris, Chas. Bracht, John Ulmer, James R. Blunt, who took their seats in the jury-box; and, after receiving the charge of the court and hearing a portion of the argument of the counsel and there not being time to further progress in the trial of this cause, they were permitted to seperate, under the instructions of the court, until to-morrow morning at 8½ o'clock.

SATURDAY MORNING, *June 15th*, 1889.

On this day come the plaintiff, by his attorneys, Mess. Barnes, Mellette and Boudinot, and come the said defendant-, by their attorneys, Mess. Du Val and Cravens and Wm. P. Hackney, and now come the jury heretofore empannelled for the trial of this cause, to wit, Albert Tinker, Wm. Joshenberger, Henry St. Clair, Samuel M. Fisher, Richmond W. Gorden, Chas. Ahrens, Henry C. Haney, Hiram Chism, Robert Harris, Charles Bracht, John Ulmer, James R. Blunt, who took their seats in the jury-box, and, after hearing the balance of the argument of counsel, retired to consider of their verdict, and after some time returned into court the following verdict, to wit:

"We, the jury, find for the plaintiff, and assess his damages at eight hundred and ninety-six & $\frac{75}{100}$ dollars."

(Signed) R. W. GORDEN, *Foreman.*

7 Whereupon the jury was by the court discharged from further consideration of the case, and it is further ordered that the defendant have until June 25th, 1889, to file motion for a new trial.

TUESDAY MORNING, *June 18th*, 1889.

On this day come the plaintiff, by his attorneys, Mess. Barnes, Mellette, and Boudinot, and moves the court for judgement against the defendant, The Southern Kansas Railway Company, for eight hundred and ninety-six & $\frac{75}{100}$ dollars.

And it appearing from the records of this court that, on the 15th day of June, 1889, a jury, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, returned into court here a verdict in favour of said plaintiff and assessed his damage at eight hundred and ninety-six & $\frac{75}{100}$ dollars, and the court, being well and sufficiently advised in the premises, it is considered, ordered, and adjudged that the said plaintiff, Jeremiah S. Briscoe, do have and recover of and from the said defendant, The Southern Kansas Railway Company, the sum of eight hundred and ninety-six & $\frac{75}{100}$ dollars, with interest at

the rate of six per cent. per annum until paid, together with all his costs in this behalf laid out and expended, and that he have execution therefor.

(Entered on margin of record.)

On this 18th day of June, 1889, comes Barnes, Mellette, and Boudinot, attorneys of record for plaintiff in this judgement, and file their statement in writing, signed by themselves, claiming a lien upon this judgement for two hundred and twenty-four dollars for their services as attorneys rendered herein under contract.

8 SATURDAY MORNING, *June 22nd*, 1889.

On this day come said defendant, by their attorneys, and file motion to set aside the verdict of the jury and for a new trial in this cause.

SATURDAY MORNING, *October 5th*, 1889.

On this day come the parties, by their respective attorneys, and the motion to set aside the verdict of the jury and for a new trial in this cause, heretofore filed, coming on to be heard, and the court, being well and sufficiently advised in the premises, doth overrule said motion; to which the defendant at the time excepted.

SATURDAY MORNING, *November 2nd*, 1889.

On this day come the defendant, by their attorneys, and tender bill of exceptions. The same signed and sealed and accepted by the court and ordered filed and made a part of the record in this case.

MONDAY MORNING, *November 18th*, 1889.

On this day come the defendant, by its attorneys, and tenders its bill of exception to the court and prays that the same may be signed and sealed by the judge holding the circuit court at the time of the trial and motion for a new trial, and that the same may be made a part of the record in this case.

That the said bill of exceptions as tendered in open court was signed and sealed by the Hon. Isaac C. Parker, the district judge, holding circuit court at the trial and hearing of the motion for a new trial, and the same is hereby ordered filed now for the 2nd day of November, the same being a day of the August term of the circuit court for the western district of Arkansas.

And it is further ordered that the said bill of exceptions
9 be made a part of the record in the above-entitled cause.

And now comes the defendant into court and by its attorneys, informs the court that it desires, by writ of error, to take this cause to the Supreme Court of the United States. It therefore, to prevent an execution issueing against its property, tenders and asks to have approved by the judge of this court a supersedeas bond, and that the same may be filed and made a part of the record in this case. Said bond being approved by the judge of this court, the same is ordered filed, and it is ordered that a writ of supersedeas

issue in this case, and that no execution issue on the judgement rendered in this case until ordered by the Supreme Court of the United States or this court.

10 In the United States District Court for the Western District of Arkansas.

JEREMIAH S. BRISCOE, Plaintiff,
vs.
THE SOUTHERN KANSAS RAILWAY COMPANY, Defendant. } Bill of Exceptions.

Be it remembered that on the trial of the above-entitled cause the plaintiff, to maintain the issues on his part, offered and read in evidence depositions of the following-named witnesses: Jeremiah S. Briscoe (the plaintiff), Peter Jamison, William Williams, R. H. Bousted (two seperate depositions), Henry Huston, Phillip Bishop, and W. F. Fagan.

The deposition- of Jeremiah S. Briscoe and William F. Fagan, taken between the hours of 10 a. m. and 6 p. m. on the 21st day of Fe-ruary, 1889, at the office of William M. Cravens, in the city of Fort Smith, Sebastian county, State of Arkansas, to be read as evidence in an action between Jeremiah Briscoe, plaintiff, and The Southern Kansas Railway Company, defendant, pending in the United States court, on the part of the plaintiff.

JEREMIAH S. BRISCOE, being duly sworn, deposes and says:

I am the plaintiff in this action. I reside in Purcell, Indian Ter-itory. I am 48 years of age. I am running a livery stable at Purcell, Indian Ter-itory. I had fifteen head of horses at the time that this cause of action occur-ed, on the tenth day of July, 1888. I had six head of horses killed by a locomotive and train of cars of the Southern Kansas Railway Company about one mile and a half north of
11 Purcell, in the Chickasaw nation, Indian Territory. The horses were killed about *about* four miles south of the northern boundary of the Chickasaw nation. The said six horses that were killed on the 10th day of July, 1888, are described as follows: One bay horse, six years old, sixteen hands high, and of the value of one hundred and fifty dollars, and this horse was used to work in single buggy or to work double, and was a safe family horse. One brown —, about eight years old, sixteen and one-half hands high, and was worth one hundred and fifty —, and was a good buggy horse.

One gray horse, three years old, fifteen hands high, and was worth one hundred dollars. I bought said horse about two weeks before and paid the sum of one hundred dollars for him.

One black horse, three years old, about fourteen and one-half hands high, and worth fifty dollars.

One sorrel horse, five years old, about twelve hands high, and worth fifty dollars; one sorrel pony, about twelve hands high, six years old, and worth forty dollars. I was informed on the morning of the 10th of July, 1888, that the above six horses were killed, and

I went immediately to the point above, and the first horse I found was the bay horse above described. He was pitched down in a ditch about 8 or 10 feet deep, along the side of the track of the Southern Kansas Railway Company. The horse was dead and had his leg broken, and one side of him was skinned and pulled off from the —. His head was lying south. The next horse I found was the brown horse above mentioned. I found him on the opposite side of the track. He was lying on his side, with both hind legs broken and one of his fore legs broken and his head doubled under him. His head was south.
12 The next was the gray horse. He was about fifty yards south of the bay. He was mashed all up, and was lying by the side of the track, dead, and his head was lying a little south of east. The next was sorrel pony above described. He was about fifty yards from the gray horse, south, and upon the opposite side of the track. He had one leg broken and was jam-ed up against the bank, and was about twenty feet from the track, and had his thigh and hind leg broken. He was alive, but died next day. I saw where this horse had run down the railway for over one hundred yards before he was knocked off. I recognized his track from the peculiar kind of a shoe that he was shod with. The next horse I found was a sorrel pony, above described, about seventy-five yards from the track; both of his hips were stoven in, and he afterwards died from the effects of the injury. All of the above six horses were dead or died soon afterwards from the effects of the injuries sustained by them. The ditch I speak of above was made by the railway company when they were building their track. The above six horses at the time they were killed were out on the pra-rie, on their range. The said railroad north of where the horses were killed is level and straight for over one mile and a quarter. It is about half a mile south of where the horses were killed to where there is any curve or anything to hinder an engineer from seeing anything on the said track. On the 26th day of June, previous to the time the above six horses were killed, I understand I had three horses killed at a point about one mile north of where six head were killed. I saw where they were buried by the side of the track. They were described as follows: One gray mare about seven years old, sixteen hands high, and was worth one hundred and fifty dollars; one gray horse about eight years old, fifteen hands high, and was worth one hundred dollars;
13 one bay mare seven years old, fifteen and one-half hands high, and worth one hundred dollars. The above three horses, at the time they were supposed to have been killed, were in a pasture. I had put them in the pasture the night before they were killed. About a month and a half before the first horses were killed I had a heiffer killed by said railway company. I found her body about twenty steps from the Southern Kansas railway track, about a quarter of a mile from Purcell, I. T. She had one hind leg broken, and died from the injuries. She was worth twenty-five dollars. She was a half-breed Jersey. I had a Poland-China sow killed by said railway company about the first of June last. I

found her north of the depot at Purcell, I. T. I found her in a ditch by the side of track. Her legs were broken and her stomache was torn open, and she was dead. She was about six or seven months old, and was worth twenty-five dollars. She had cost me twelve dollars to have laid down at Purcell about three months before. The six horses that were killed on the 10th of July I had turned out on their range the evening before, and I had sent a man by the name of Jamison to go after them the next morning, and he was the person that brought me the information that *that* they were killed.

Examination by WM. M. CRAVENS, Esq.:

I have lived at Purcell two years. I am not a citizen of the Chickasaw nation, either by blood or mar-iage or adoption. I got a permit of a man by the name of Johnson, who was a permit collector. The permit authorized me to keep a livery stable in Purcell, I. T.

I turned the six horses out on the pra-rie the night before they were killed. I did not see any of them killed, and don't know how they were killed, except in the manner I found them. I am
14 a white man and a citizen of the United States. The bay horse that was killed I raised in the nation. I have known several horses that were raised in the nation to sell for one hundred and fifty dollars. I have known of ten or twelve of this kind to sell for said sum. A great many more horses in that country sell for less than one hundred dollars than there are that bring over that. I call the brown horse about eight years old, but am not pos-tive of his exact age. I had owned him about six months. I had bought him at Purcell. I paid one hundred and twenty-five dollars for him.

The gray horse was a three-year old colt. I had him about two weeks and paid one hundred dollars for him.

The sorrel horse I had about six months; don't remember what I paid for him. He was twelve hands high.

The black horse I did not own. He belonged to a railroad man, who gave me an order for said horse, and I was to sell the *the* horse and send him the money when he wrote me where he was. The other sorrel pony I bought, and don't remember what I paid for him. He was twelve hands high. As to the horses that were killed on the 26th of June, 1888, I know nothing about of my own personal kno/ledge, excepting I saw the mounds where they were said to be buried, but I don't know what was in the mounds.

The gray horse that was killed the 26th of June I traded for and gave a pony. The gray mare I traded for or got on a board bill and paid part cash, and I got the bay mare the same way. I gave twelve dollars for the heifer. She was a two-year-old, and I had bought her to make a milch cow.

15–89 Redirect examination:

Outside of the value of my stock, the loss of loosing my stock from my business and otherwise, I am damaged at least five hundred

dollars. I could not carry on my business for some time after my stock was killed, and I came pr-tty near having to close down my business on account of the loss. I have not fully recovered from the effects of it yet. (D'f't objects to these questions relating to the damage to business.) I had three horses of my own left, and two I was working for their feed.

(Si-ned) J. D. BRISCOE.

* * * * * * *

90 This was all the evidence had in this cause.

Thereupon the court, at the request of the plaintiff, gave instructions numbered 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, & 12; to which defendant at the time objected, and, as the objection was overruled, at the time excepted.

Instructions Asked by Plaintiff.

(1.) If the defendant owned the road upon which the stock mentioned in complaint were killed, the fact that defendant had leased said road to the Atchison, Topeka & Santa Fé R. R'y Co. and the last-named company were operating the road at the time of the killing and were running the particular engine and cars that killed the stock in question, the defendant road would still be liable if the killing of the stock was done negligently.

(2.) If the jury believe that the stock mentioned in plaintiff's complaint or any part thereof was killed or injured through carelessness and negligence of defendant's servants or the servants of defendant's lessee, they will find damages for the plaintiff in a sum equal to the value of said stock at time of killing or injuring, provided, however, that the difference in value of stock before and after injury shall be the measure of damages.

(3.) Refused. And if the jury find that the killing and injury was willful and caused by gross negligence, they will assess as damages for the plaintiff an additional amount sufficient to cover the loss sustained by him by reason of being deprived of the use of his stock.

91 (4.) If the jury find for the plaintiff they will assess his damages at the market value of the horses as established by the proof at the time of the killing, and in arriving at the value of said horses the jury are authorized to consider any particular qualities they possessed affecting their market value.

Woods' R. R'y Law, 1569.

And they may give plaintiff six per cent. interest on such market value from the time of the killing to the present time.

(5.) The fact that the stock mentioned in complaint or any part thereof was killed by train on def't's road, and the further fact that said killing was the result of negligence on the part of the servants of defendant or its lessees may each be established by circumstantial evidence.

Woods, 1566.

(6.) It was the duty of the defendant railroad company, or its lessees operating it, to keep the right of way, 100 ft., free from al- obstructions, and if the jury believes that the weeds were permitted to grow upon the right of way of sufficient height and density to prevent the engineer in charge of the train from seeing the horses when within a few feet of the track they are authorized to find the said railroad company guilty of negligence in permitting the right of way to be thus obstructed.

28 Ill., p-. 17, 78, 111, 112; Woods on R. R'y, 1350.

(7.) The plaintiff is not guilty of negligence in permitting his horse- to run upon the common nor by leaving them in the pasture through which defendant's railroad runs.

12 Cal., 531; L. 10 *O*, 268.

(8.) It is the duty of the engineer of a railroad train to keep a careful and constant lookout and watch for stock upon the track; and if the proof in this case shows that this was not done, the
92 defendant is guilty of negligence and liable for the killing of the stock of the plaintiff.

L. R. & Ft. S. R. R'y Co. *vs.* Fuilly, 37 Ark., 563.

(9.) The court instructs the jury that any agreement between plaintiff and his wife as to the disposition of personal property belonging to plaintiff would be of no effect and pass no title if plaintiff were permitted to remain in possession and control of said property.

(10.) The court instructs the jury that the plaintiff could not convey the horses sued for directly to his wife, and that any pretended conveyance of that kind is void.

Parson's L., vol. —, pp. 399.

(11.) If the jury believe that the plaintiff had possession, use, and control of the horses sued for in this action, they are authorized to find that this special ownership was sufficient to authorize him to recover, even though the legal title to said horses was in some one else.

1 Amer. Rep., 137.

(12.) If the jury believe that the plaintiff had possession of the bay mare and the gray mare killed and injured in June by the freight train, by agreement with Peter Jamison that he should hold them until a debt due him from Jamison was paid, the plaintiff had such ownership as would entitle him to recover.

R. R'y Co., 50 Ark., 169; 1 Thompson on Negligence, 196.

93 And thereupon the defendant requested the court to instruct the jury as in numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, & 12, and the court refused to give instructions numbered 3, 6, 7, 8, 10, 11, and 12; the defendant at the time excepted.

Special Instructions Asked for by the Defendant to be Given the Jury.

(1.) The court instructs the jury that the defendant has prepared and requests the court to submit to the jury certain written questions, which, if you find for the plaintiff, it will be your duty to answer by writing such answer under each question fully.

2. The court instructs the jury that the burden in this case is upon the plaintiff, and before he is entitled to recover in this action he must prove—

First. That he was the owner of the property at the time it was injuried or it was in condition as to title named in the instruction of plaintiff.

Second. The value thereof.

Third. That the engines and cars of and in charge of the employees of the defendant or its lessee done the injury.

Fourth. That the plaintiff was without fault or negligence himself.

Fifth. That the employees of the defendant or its lessee in charge of the engine and carrs which done the injury was guilty of wilful and gross negligence in the killing of said stock after the employees discovered said stock on the track, and if the plaintiff has failed to prove by a preponderance of the evidence any one of the five propositions above enumerated, then you must find a verdict for the defendant.

3. Under the evidence in this case the plaintiff fails to show any legal right or authority for himself or his property to be and abide in the Chickasaw nation, and I instruct you that both were tres-
pressers in said nation and said stock tres*pressers* upon the
94 road-bed and right of way, and that by reason thereof it will be your duty to return a verdict for the defendant unless you believe from the evidence that the servants of the defendant, after discovering the stock upon the track, wilfully run it down.

4. The law presumes that in the running of its engines and cars the employees of a railroad company exercise due care and caution, and that when stock are killed or injured that it was incident to the business, and this presumption continues until overthrown by a preponderance of the evidence.

5. There is no law which required or made it obligatory on the part of the defendant to fence its right of way, and if the plaintiff turned his horses and stock loos- at and near the right of way and they wandered upon its right of way and track and were killed, he cannot recover unless the jury believe from the evidence that defendant's employees, after discovering them upon the track, wilfully run them down without making any effort to prevent it.

6. In this case there was no law making it obligatory upon the defendant to fence its right of way, and *that defendant* turned his stock out when they were liable to go upon defendant's track and with full knowledge that they might go upon said right of way and be killed, *and* under the evidence in this case he cannot recover

therefor, he having shown no act sufficient to create a liability on defendant's part therefor.

7. The court instructs the jury that under the law in this case the plaintiff's evidence is not sufficient to entitle him to a verdict at your hands, and that you must return a verdict for the defendant.

8. The court instructs the jury that if they believe from the evidence, at the time the plaintiff's stock was killed and
95 injured (and the evidence is clear and positive and uncontradicted on this point), that the Atchison, Topeka and Santa Fé Railroad Company had possession of the track and right of way when said stock was killed and injured, and that it was then operating the same, with its servants and employees, under a lease from the defendant, then the defendant is not liable therefor, and it will be your duty to find for the defendant.

9. The court instructs the jury that the words gross and wilful negligence in law means, as applied to this case, a wilful and deliberate running of the engine upon the stock after the same was seen by the engineer where and in time *of* him to have stopped the engine before striking them if he had used the appliances furnished him, in the way of air-brakes, for that purpose.

In other words, if the engine-r, after seeing the stock upon the track and re*a*lizing that he must hit them if he did not stop his engine, and there was time enough after seeing them to have stopped, so as not to strike, and he failed to do so, then the company would be liable; otherwise you must find for the defendant.

10. Evidence that property killed was held by the plaintiff for debt is not such ownership of the property as would entitle the plaintiff to recover in this action; and if you believe that the big gray mare and bay mare were the property of Peter Jamerson, and that he had the possession thereof, then the plaintiff cannot recover for the injury of them in this action, although you may believe from the evidence that plaintiff was to have them until his debt was paid.

DU VAL AND CRAVENS AND W. P. HACKNEY,
Att'ys for Defendant.

96 11. The court instructs the jury that the defendant, having leased its road-bed and property to the Atchison, Topeka and Santa Fé Railroad Company before the committing of the injury complained of and such injury having been inflicted by the engine and cars of that company in charge of servants and employees of that company, the defendant cannot be held liable in this action for the torts done by the servants of that company.

DU VAL AND CRAVENS AND W. P. HACKNEY,
Att'ys for Defendant.

12. The court instructs the jury that the plaintiff in this case is not and was not an inhabitant of the Chickasaw nation, in the Indian Territory, as contemplated by the act of Congress granting the Southern Kansas Railway Company a right of way and defining its

liability therein, and the claim of the plaintiff is not sufficient to give this court jurisdiction, being less than two thousand dollars; therefore you must find and return a verdict for the defendant herein.

DU VAL AND CRAVENS AND W. P. HACKNEY,
At'ys for Defendant.

97 Whereupon the jury found the issues in favour of the plaintiff, and thereupon the defendant moved the court to set aside the verdict and grant the defendant a new trial.

The defendant moves the court to set aside the verdict of the jury in the above-entitled cause and grant a new trial for the following reasons:

First. Because the court erred in refusing to submit to the jury, at the request of the defendant, the particular questions of fact to be found by the jury, as stated in writing by the defendant.

Second. Because the court erred in refusing to give instructions numbered one, two, three, five, six, seven, eight, and ten and eleven and twelve requested by defendant.

Third. Because the court erred in instructing the jury that the lease of the defendant to the Atchison, Topeka & Santa Fé Railroad was void.

Fourth. Because the court erred to the prejudice of the defendant in giving instructions asked by the plaintiff numbered one, two, four, six, nine, ten, and eleven.

Fifth. Because the verdict of the jury is contrary to law and evidence.

W. P. HACKNEY, DUVAL & CRAVENS,
Attorneys for Defendant.

Filed June 22nd, 1889.

And the motion being overruled, the defendant at the time excepted, and leave and time was given by the court to file his bill of exceptions, which the defendant here tenders, and prays that the same may be signed, sealed, and made a part of the record in this cause.

Signed and sealed by me this 18th day of November, A. D. 1889.

I. C. PARKER,
U. S. Dist. Judge, Holding Circuit Court at Time of Trial of Above Case.

98 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the western district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between Jeremiah S. Briscoe, plaintiff, and The Southern Kansas R'y Co., a manifest error hath happened, to the

great damage of the said The Southern Kansas R'y Co., as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 21 day of August, in the year of our Lord one thousand eight hundred and ninety.

The Seal of the Circuit Court, Western District of Ark., U. S. A.

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States, Western District Arkansas.

Allowed by—
I. C. PARKER,
U. S. Dis. Judge, Holding Circuit Court.

99 Know all men by these presents that we, The Southern Kansas Railway Company and E. Wilder and J. R. Mulvane, are held and firmly bound unto Jeremiah S. Brisco in the full and just sum of two thousand five hundred dollars, to be paid to the said Jeremiah S. Brisco, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of November, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a term of the district court of the United States for the western district of Arkansas, in a suit depending in said court between Jeremiah S. Brisco, plaintiff, and The Southern Kansas Railway Company, defendant, a judgment was rendered against the said defendant, The Southern Kansas Railway Company, for the sum of eight hundred and ninety-six & $\frac{75}{100}$ — on the 18th day of June, 1889; and the said defendant, The Southern Kansas Railway Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Jeremiah S. Brisco, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said defendant, The Southern Kansas Railway Company, shall prosecute

said writ to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE SOUTHERN KANSAS RAILWAY COMPANY,
By its secretary, E. WILDER. [SEAL.]
J. R. MULVANE. [SEAL.]
E. WILDER. [SEAL.]

Sealed and delivered in presence of—
G. N. HOLMES.

Approved by—
I. C. PARKER,
U. S. Dist. Judge.

A true copy.

STEPHEN WHEELER, *Cl'k*,
By I. M. DODGE, *D. C.*

100 STATE OF KANSAS, } ss:
Shawnee County, }

We, the undersigned, sureties on the above and foregoing undertaking, do solemnly swear that we are residents of the State of Kansas, and that we are each worth twenty-five hundred dollars over and above all exemptions, debts, and liabilities, so help us God.

E. WILDER.
J. R. MULVANE.

Subscribed and sworn to before me this 13th day of November, 1889.

[SEAL.] GEO. N. HOLMES,
Notary Public.

My commission expires Dec. 6, 1890.

101 UNITED STATES OF AMERICA, ss:

The President of the United States to Jeremiah S. Briscoe, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the western dist. of Ark., wherein the Southe-n Kansas R'y Co. — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Isaac C. Parker, judge of the district court of the United States, this 29 day of August, in the year of our Lord one thousand eight hundred and ninety.

I. C. PARKER,
U. S. Dis. Judge, Holding Circuit Court.

On this 29 day of Aug., in the year of our Lord one thousand eight hundred and ninety, personally appeared Wm. M. Cravens before me, the subscriber, he being the attorney of record for the Southe-n Kans. Railway Co., and makes oath that he delivered a true copy of the within citation to Wm. M. Mellette, att'y for J. S. Briscoe, on the 29th day of Aug., 1890.

WM. M. CRAVENS.

Sworn to and subscribed the 29th day of August, A. D. 1890.

{ The Seal of the District Court, Western District of Ark., Fort Smith., U. S. A. }

STEPHEN WHEELER, *Clk,*
By I. M. DODGE, *D. C.*

102 UNITED STATES OF AMERICA, }
Western District of Arkansas. }

I, Stephen Wheeler, clerk of the circuit court of the United States in and for the western district of Arkansas, hereby certify that the foregoing is a true and correct transcript of the record and of all papers on file in this office in the case of Jeremiah S. Briscoe *vs.* The Southern Kansas Railway Company.

The Seal of the Circuit Court, Western District of Ark., Fort Smith, U. S. A.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Fort Smith, in said district, this 23d day of September, A. D. 1890.

STEPHEN WHEELER,
U. S. Circuit Clerk.

103 *Lease of the Railroad and Property of the Southern Kansas Railway Company to the Atchison, Topeka and Santa Fé Railroad Company.*

This indenture of lease made on this third day of April in the year of our Lord one thousand eight hundred and eighty-eight, by and between The Southern Kansas Railway Company, a corporation established under the laws of the State of Kansas, hereinafter called the Southern Kansas Company, and the Atchison, Topeka and Santa Fé Railroad Company, a corporation created by and existing under the laws of the Territory and State of Kansas, hereinafter called the Atchison Company, witnesseth:

That whereas the said Southern Kansas Company is the result of a series of consolidations, the present corporation having been created by articles of agreement, filed on April 16, 1885, consolidating the "Southern Kansas Railway Company" with certain other companies under the name "The Southern Kansas Railway Company," the said articles of agreement or charter having been subsequently amended by an amendment filed on April 15, 1886;

And whereas an act of the Congress of the United States approved July 4, 1884, granted to the "Southern Kansas Railway Company" a right of way through the Indian Territory and other powers,

which are now vested by virtue of the consolidation aforesaid in the existing "The Southern Kansas Railway Company" and are accepted and adopted by its said amendment to its charter;

And whereas the authorized lines of railroad of the said present Southern Kansas Company, as described in its said articles of consolidation as now amended, extend from the city of Girard in the county of Crawford and State of Kansas, and into and through the counties of Crawford, Neosho, Labette, Montgomery, Chautauqua, Cowley, Sumner, and Harper in said State, the estimated length of said portion of said lines of railroad being two hundred and sixty-six (266) miles; from the city of Emporia to the city of Ottawa in said State, and through the counties of Wyandotte, Johnson, Douglas, Franklin, Osage, Coffey, and Lyon, the estimated length of said portion of said lines of railroad being one hundred and fifteen (115) miles; from the town of Harper in the State of Kansas to a point at or near Dodge City, in the county of Ford, passing through the counties Harper, Kingman, Barber, Pratt, Comanche, Edwards, and Ford in the State of Kansas, or such of those counties as may be found to be upon the most practicable route from the town of Harper to Dodge City, with a branch from a point on the main line twelve to fifteen miles west of Harper southwesterly to a point in Barber county, on the boundary line between the State of Kansas and the Indian Territory, thence westerly through the counties of Barber, Comanche, Ford, Seward, Finney, and Hamilton in the State of Kansas, to the western line of said State, or through such of those counties as may be found to be upon the most practicable route from the starting point in Barber county, to the west line of the State of Kansas, the estimated length of said portion of said lines of railroad being about four hundred (400) miles; from Lawrence and Waseca Junction respectively, through the counties of Douglas, Johnson, Franklin, Coffey, Anderson, Allen, Neosho, Labette, Montgomery, Wilson, Elk, Cowley, Sumner, Harper, and Barber in a southerly, southwesterly, and westerly direction, to and through Burlington, Coffeyville, Hunnewell, and Harper respectively, the estimated length of said portion of said lines of railroad being about four hundred and sixteen and seventy-four one hundredths (416.74) miles; and from Winfield, in the county of Cowley in the State of Kansas, in a southerly direction to the northern line of the Indian Territory, the length of said portion being about sixteen and five one hundredths (16.05) miles; all of the above-described portions of the said lines being in the State of Kansas, and the authorized line of the said railway company in the Indian Territory as described in said act of Congress and in the said amendment to its charter being as follows: Beginning at a point on the northern line of said Territory, where an extension of the Southern Kansas railway from Winfield in a southerly direction would strike said line, running thence south in the direction of Denison in the State of Texas, on the most practicable route, to a point at or near where the Washita river empties into the Red river, with a branch constructed from a point at or near where said main line crosses the northern line of said Territory, westwardly along or near the north-

ern line of said Territory, to a point at or near where Medi-
104 cine Lodge creek crosses the northern line of said Territory and from that point in a southwesterly direction, crossing Beaver creek at or near Camp Supply, and reaching the west line of said Indian Territory at or near where Wolf creek crosses the same; the said portions of the said lines of railroad which are within the Indian Territory being called the Gulf division of the said railway company;

And whereas the said Southern Kansas Company has constructed various portions of its said lines of railroad in Kansas and the Indian Territory, amounting in all to about eight hundred and thirty-nine and seventy-seven one hundredths (839.77) miles, and is now operating the same, and may from time to time hereafter complete and extend its said lines as authorized by its said articles of consolidation and the said act of Congress;

And whereas the various portions of the said lines of railroad of the said Southern Kansas Company are subject to first mortgages heretofore respectively made by the Kansas City, Lawrence and Southern Railroad Company, the Southern Kansas and Western Railroad Company, the Sumner County Railroad Company, the Ottawa and Burlington Railroad Company, the Kansas City and Olathe Railroad Company, the Kansas Southern Railway Company, and the Kansas City and Emporia Railroad Company, and by the said present company upon its Harper and Western division, its Gulf division, and its Girard extension, and to a second mortgage made by the said present company upon its Kansas City and Emporia division;

And whereas the said Southern Kansas Company by virtue of the terms of the various consolidations through which it was formed, or by its own direct promises, is liable for the payment of the principal and interest of all of the bonds secured by each of the said mortgages;

And whereas the said Southern Kansas Company has in addition to the said mortgage bonds issued income bonds amounting in all to one million four hundred and eighty thousand dollars, the yearly interest of which is dependent on the net earnings of the said Southern Kansas Company, but cannot exceed six per cent. in any one year and is non-cumulative;

And whereas the constructed line of railroad of the said Southern Kansas Company forms a continuous line with the road of the said Atchison Company by direct connection therewith at Emporia in said State of Kansas; connecting therewith also at various points through intermediate lines already constructed, which the said Atchison Company has the right by contract or otherwise to use or operate, or the principal or interest of whose bonds it has guaranteed, or the whole or a majority of whose stock it has purchased, or where all these conditions concur; and will likewise connect at various other points with extensions of some of the said intermediate lines hereafter to be constructed;

And whereas the said Atchison Company owns or controls all of the outstanding capital stock of the said Southern Kansas Company,

and has also guaranteed the payment of the principal and interest of the said Southern Kansas Company's Gulf division bonds, so that the interests of the said two companies are identical;

And whereas the line of the said Southern Kansas Company can be more conveniently and economically managed and operated by the said Atchison Company than by the said Southern Kansas Company itself:—

Now therefore the said Southern Kansas Company, in consideration of the premises and of the covenants and agreements of the said Atchison Company hereinafter contained, doth by these presents grant lease and demise to the said Atchison Company and its successors all its lines of railway and telegraph with the branches thereof as now located and constructed or as they may hereafter be located and constructed during the period of this lease; the said lines of railroad now constructed, running from Lawrence to Coffeyville about 143.33 miles, from Lawrence Junction to Holliday about 45.87 miles, from Ottawa to Emporia about 56.42 miles, from Burlington Junction to Burlington about 42.21 miles, from Chanute to Pittsburg about 59.23 miles, from Cherryvale to Medicine Lodge about 181.54 miles, from Wellington to Hunnewell about 18.35 miles, from Attica to Kiowa about 22.41 miles, all of the said points being in the State of Kansas; and likewise running from Arkansas City in the State of Kansas in a southerly direction to the northern boundary of the Indian Territory, thence south through the Indian Territory to a connection with the road of the Gulf, Colorado and Santa Fé Railway Company at Purcell in the Indian Territory, about 154.06 miles, and from Kiowa in the State of Kansas in a general southwesterly direction through the Indian Territory to a connection with the line of the Southern Kansas Railway Company of Texas at the boundary line between the State of Texas and the Indian Territory about 116.35 miles;

Together with all property and rights now or hereafter appertaining to the said lines of railroad and telegraphs or the equipment or operation thereof:

Including all railroads, telegraphs, ways, rights of way, rolling stock and equipments; all tracks, bridges, viaducts, culverts, fences, and other structures; all depots, depot grounds, station-houses, engine-houses, machine shops, and other buildings; whether now held or hereafter to be acquired; and including also all lands and real estate and all other property real and personal of every
105 nature whatsoever now belonging to the said Southern Kansas Company or which may hereafter be acquired by it; and all the rights, privileges, and franchises of said Southern Kansas Company necessary to the operation and management of said lines or the business thereof now held or hereafter to be acquired by the said Southern Kansas;

But subject to the mortgages hereinbefore named.

To have and to hold said demised railroad and premises aforesaid unto the said Atchison Company, its successors and assigns, from the first day of January eighteen hundred and eighty-eight, until the day preceding the last day of the corporate existence of the said

Southern Kansas Company, and in case its corporate existence shall hereafter be extended, then until the day preceding the last day of such extended corporate existence, yielding and paying therefor rent as hereinafter provided, subject however to the said mortgages.

And, in consideration of the premises, the parties hereto do covenant, promise, and agree each for itself, its successors and assigns, to and with the other its successors and assigns, as follows, to wit:—

Article first. The said Atchison Company at all times during the continuance of the said term of this lease shall maintain, manage, use, and operate, and keep in good and working order, condition, and repair, at its own expense, except as hereinafter provided, the entire line hereby demised, as it shall be completed by the said Southern Kansas Company, and all the fixtures and appurtenances thereof, and keep the same fully supplied with motive power, rolling stock, and equipment, so that the traffic and business of the road shall be encouraged and developed, and full accommodation given to the public on reasonable terms, and shall deliver up the said line and all its buildings, fixtures, and appurtenances, except such removable property as is provided for in article ninth of this indenture, at the expiration of said term, in good order and repair.

Article second. The said Atchison Company shall, at its own cost, employ during the continuance of the said term all such superintendents and employees as shall be necessary to maintain, work, use, and operate said line hereby demised.

Article third. The said Atchison Company shall, during the existence of this lease, as and for rental to be paid for the use of said line to the said Southern Kansas Company, pay promptly, as the same become due and payable according to their tenor, the interest or coupons of and upon any and all bonds, for the payment of which the said Southern Kansas Company is liable, which have been lawfully issued under any mortgage now in existence, including the first mortgages already named made by the Kansas City, Lawrence and Southern Railroad Company, the Southern Kansas and Western Railroad Company, the Sumner County Railroad Company, the Ottawa and Burlington Railroad Company, the Kansas City and Olathe Railroad Company, the Kansas Southern Railway Company, and the Kansas City and Emporia Railroad Company, and by the said present company upon its Harper and Western division, its Gulf division, and its Girard extension, and the second mortgage likewise already named made by the said present company upon its Kansas City and Emporia division; and shall likewise in each year pay the full annual interest of six per cent. upon all of the outstanding income bonds of the said Southern Kansas Company, whether such interest shall have been earned by the said leased lines or not; and also the interest or coupons of and upon any bonds hereafter issued by the said Southern Kansas Company under and in accordance with the provisions of article fifth of this indenture.

And shall also, during the existence of this lease, pay promptly, as the same become due and payable according to their tenor, the

interest or coupons of and upon any bonds, secured by mortgage or not, which the said Southern Kansas Company may with the consent and concurrence of the said Atchison Company issue in order to redeem, take up, and pay at maturity any of the bonds above named falling due during the continuance of this lease; the said Atchison Company having the option of buying at maturity any of said bonds so falling due, and holding the same against the said Southern Kansas Company, instead of allowing such new bonds to be issued in place thereof.

Article fourth. The said Atchison Company shall at all times during the continuance of this lease pay all taxes and assessments at any time hereafter imposed upon the said Southern Kansas Company under authority of any United States, State, territorial, county, city, or township laws, or under any other lawful authority, or upon the whole or any part of the said line or its buildings or appurtenances, or any property hereby demised.

Article fifth. Should it become necessary or desirable in the judgment of the directors of the said Atchison Company, for the accommodation of the business of said demised road, to build any extensions or branches authorized by the articles of consolidation of the said Southern Kansas Company, or by the said act of Congress, or to construct additional side tracks, erect additional station-houses, water stations, water-houses, round-houses, or shops, or make other permanent improvements, including fencing, the said Southern Kansas Company will, upon the request of the said Atchison Company, construct all such extensions and branches and make all such additions and improvements at its own cost and expense. All such branches, extensions, additions, and improvements may
106 be constructed and made by said Atchison Company, which shall thereupon be paid the cost and expense thereof by the said Southern Kansas Company in bonds of said Southern Kansas Company, secured by mortgage or otherwise, or unsecured, or in shares of the capital stock of the said Southern Kansas Company, or in all or any of these at the option of the said Atchison Company, the terms of any such payment to be fixed at the time thereof.

Article sixth. The said Atchison Company shall assume and pay all damages, demands, and liabilities which may arise or be incurred by reason of any injury or damage to person or property, and all other damages whatsoever resulting from or growing out of the maintenance, repair, operation, and running of said railroad by the said Atchison Company, and will pay any penalties which may be imposed upon the railroad of the Southern Kansas Company, or upon said Southern Kansas Company, by reason of any neglect or omission of the said Atchison Company to comply with any statute, or by reason of the commission of any act which may be prohibited by law in the use of said railroad and the premises hereby granted; and the said Atchison Company agrees to indemnify and save harmless the said Southern Kansas Company against all expense, loss,

damage, and cost, by reason of any of the matters and things aforesaid, and against any and all costs and expenses in any suit or proceedings authorized in the name of the said Southern Kansas Company.

The said Atchison Company shall furnish, at the request of the said Southern Kansas Company, from time to time whenever necessary, any and all reports and statements which the said Southern Kansas Company is now or may be hereafter required to make or file under or by virtue of any law enacted by competent authority.

Article seventh. The said Atchison Company shall at all times during the said term have the full and exclusive right to manage, use, and control said demised railroad and premises, and to regulate and determine the rates of tolls, freight, and charges for all the transportation over the whole or any part of said demised railroad and premises, and to charge and collect the same and appropriate the same to its own use, and shall have, use, exercise, and enjoy all the rights, powers, and authority aforesaid, and all other corporate powers, and all rights, powers, easements, privileges, and immunities now possessed or which may hereafter be acquired by the said Southern Kansas Company, necessary or convenient for the use, possession, enjoyment, management, and operation of the said demised railroad and premises as herein provided.

Article eighth. The said Southern Kansas Company covenants and agrees that it is well and lawfully possessed of the premises hereby demised, and has full power to convey the same as aforesaid, and the same in quiet enjoyment of the said Atchison Company will warrant and defend, subject to the mortgages aforesaid;

That it and its successors shall and will, whenever required by the said Atchison Company or its successors, during the continuance of the said term, do and perform any and every corporate act which may be necessary, useful, or appropriate to secure to the said Atchison Company or its successors the full enjoyment of the premises hereby demised, and of every franchise, right, easement, power, privilege, and immunity connected therewith or appertaining to the same now possessed or which may be hereafter possessed by the said Southern Kansas Company or it successors, and hereby granted or intended to be granted to the said Atchison Company and its successors under this instrument;

That it will hereafter, at any time, upon the request of the said Atchison Company, give, make, and execute such further and other conveyances, assurances, papers, and instruments as may be necessary or proper to carry into full force and effect all the purposes of this indenture.

And to enable the said Atchison Company to beneficially enjoy said property, rights, privileges and benefits herein demised and mentioned, the said Southern Kansas Company hereby appoints the said Atchison Company and its successors and assigns its attorney irrevocable, during the existence of this lease, with full power and right to use the name of the said Southern Kansas Company in and about the business, maintenance, operation, and use of said road, with

power to make any and all contracts in proper furtherance of the objects hereinbefore set forth with any person or corporation in the name of said Southern Kansas Company, under its corporate seal or otherwise, and generally to do all other acts and things in and about the premises which said Southern Kansas Company might lawfully do, and to use the name of said Southern Kansas Company in and about any legal proceedings and suits either in law or in equity, as the said Atchison Company may deem requisite and necessary in carrying out the objects and intent of this indenture.

Article ninth. All rolling stock and all other removable property which said Atchison Company shall purchase or obtain for any purpose in connection with the railroad or other property hereby demised shall be and remain the property of said Atchison Company, and may, as well as any rails, sleepers, and other property which it desires to remove for the purpose of repairs or improvements, be removed and disposed of by said last-named company for its own use; it being always understood and agreed however that it shall keep and deliver up said railroad and other property hereby demised in good repair and good working order and condition as hereinbefore agreed.

Article tenth. This lease is upon condition that the failure of the said Atchison Company for a period of three months to perform the covenants as to payment of rent herein contained shall terminate said lease, if said Southern Kansas Company shall so elect.

107 Article eleventh. All matters of dispute which may arise between the parties hereto in connection with or growing out of this indenture shall be submitted to the arbitrament and award of three disinterested persons, one to be chosen by each of the parties hereto, and the third by the two so chosen; and the award of these three or of a majority of them shall be final and binding upon the parties hereto upon all the matters submitted to such arbitrators.

Article twelfth. It is hereby agreed by and between the said two companies parties hereto that this lease shall relate back to and take effect from the first day of January 1888; and all previously existing contracts between the said two companies in regard to the operation of any part of the line of either of them by the other are hereby rescinded and cancelled as of said first day of January, 1888.

It is also agreed that, inasmuch as the lease of the road of the Southern Kansas Railway Company of Texas to the said Southern Kansas Company hitherto contemplated and agreed upon has never been executed, the lease of said Texas road shall be made to the said Atchison Company instead of to the said Southern Kansas Company, in order that the entire line may be operated by the said Atchison Company in accordance with the spirit of this instrument.

In witness whereof, the parties hereto have caused their respective corporate seals to be affixed to these presents, as also to a counterpart hereof, and the same to be signed by their respective presidents

and attested by their respective secretaries or assistant secretaries thereunto duly authorized, on the day and year first above written.

[SEAL.] THE SOUTHERN KANSAS RAILWAY COMPANY,

(Signed) By WM. B. STRONG, *President.*

Attest:

(Signed) GEO. L. GOODWIN,
Assistant Secretary.

[SEAL.] ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY,

(Signed) By WM. B. STRONG, *President.*

Attest:

(Signed) GEO. L. GOODWIN,
Assistant Secretary.

COMMONWEALTH OF MASSACHUSETTS, *County of Suffolk,* } *ss:*

Personally appeared before me, the undersigned, a notary public within and for the county and Commonwealth aforesaid, William B. Strong, whose name is subscribed to the foregoing instrument, the said Strong being personally known to me and personally known to me to be the president of the Southern Kansas Railway Company, and acknowledged that the said instrument was signed by him and executed by the said company as therein set forth freely and voluntarily for the purposes therein named.

Witness my hand and seal notarial on this fourth day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL.] (Signed) HENRY W. SWIFT,
Notary Public.

Commission expires Dec'b'r 12th, 1890.

108 COMMONWEALTH OF MASSACHUSETTS, *County of Suffolk,* } *ss:*

Then personally appeared before me, the undersigned, a notary public within and for the Commonwealth aforesaid, William B. Strong, whose name is subscribed to the foregoing instrument, the said Strong being personally known to me and personally known to me to be the president of the Atchison, Topeka and Santa Fé Railroad Company, who acknowledged that the said instrument was signed by him and executed by the said company as therein set forth freely and voluntarily for the purposes therein named.

Witness my hand and seal notarial on this fourth day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL.] (Signed) HENRY W. SWIFT,
Notary Public.

Commission expires Dec'b'r 12th, 1890.

109 *Copy of Resolution of the Stockholders of the Southern Kansas Railway Company Passed at a Meeting Held on the Tenth Day of May*, 1888.

Resolved, That the indenture of lease between this company and the Atchison, Topeka and Santa Fé Railroad Company dated the third day of April, 1888, leasing the road and property of this company to the said Atchison, Topeka and Santa Fé Railroad Company, is hereby approved and ratified, the said lease to take effect from the first day of January, 1888, in accordance with its terms.

I hereby certify that the above is a true copy of a resolution passed by the stockholders of the Southern Kansas Railway Company at an annual stockholders' meeting held at Topeka, Kansas, on the tenth day of May, 1888, and that persons holding or representing two-thirds in amount of the capital stock of said railway company voted for said resolution.

[SEAL.] (Signed) E. WILDER, *Secretary.*

Copy of Resolution of the Stockholders of the Atchison, Topeka and Santa Fé Railroad Company Passed at a Meeting Held on the Tenth Day of May, 1888.

Resolved, That the indenture of lease between the Southern Kansas Railway Company and this company dated the third day of April, 1888, leasing the road and property of the Southern Kansas Railway Company to this company, is hereby approved and ratified, the said lease to take effect from the first day of January, 1888, in accordance with its terms.

I hereby certify that the above is a true copy of a resolution passed by the stockholders of the Atchison, Topeka and Santa Fé Railroad Company at an annual stockholders' meeting held at Topeka, Kansas, on the tenth day of May, 1888, and that persons holding or representing two-thirds in amount of the capital stock of said railroad company voted for said resolution.

[SEAL.] (Signed) E. WILDER, *Secretary.*

[Endorsed:] E. W. 3216. Lease of the railroad and property of the Southern Kansas Railway Company to the Atchison, Topeka and Santa Fé Railroad Company. Dated April 3, 1888. Exhibit "A." E. W. Geo. N. Holmes, notary public. Opened, published, and filed May 13th, 1889. Stephen Wheeler, clerk, by I. M. Dodge, D. C.

110 In the Supreme Court of the United States, October Term, 1891.

SOUTHERN KANSAS RAILWAY CO., Pl'ff in Error,
vs.
J. S. BRISCOE. } No. 869.

In the above-entitled cause it is hereby stipulated that in printing the record the clerk may omit therefrom the depositions commencing on page 15 of the original record with the deposition of William T. Fagan and extending through the consecutive pages of the original record to page 89, inclusive.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Plaintiff in Error.
A. H. GARLAND AND
H. J. MAY,
Attorneys for Defendant in Error.

111 [Endorsed:] Supreme Court of the U. S. 1891, October term. No. 869. The Southern Kansas Railway Company, plaintiff in error, *vs.* J. S. Briscoe. Stipulation to omit parts of record in printing. Britton & Gray, attorneys & counsellors at law, Pacific building, 622 F street N. W., Washington, D. C.

[Stamped:] Office Supreme Court U. S. Filed Jan. 20, 1892. James H. McKenney, clerk.

Endorsed on cover: Case No. 14,277. W. Arkansas D. C. U. S. No. 869. The Southern Kansas Railway Company, plaintiff in error, *vs.* Jeremiah S. Briscoe. Filed October 14, 1890.

Office Supreme Court U. S.
FILED.
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JAMES. H. McKENNEY.
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

THE SOUTHERN KANSAS RAILWAY CO., Pl'ff in Error,
vs.
J. S. BRISCOE. } No. 869.

Error to the district court of the United States for the western district of Arkansas.

Comes the defendant in error and moves the court to advance this cause upon the docket for hearing, and for reason therefor he shows the verdict & judgment herein do not amount to the sum of five thousand dollars, but only to the sum of eight hundred & ninety-six dollars; but it appears in & by the record a question of jurisdiction was presented in the court below, and this application comes within the provisions of rule 32 of this court.

Respectfully,

A. H. GARLAND &
H. J. MAY,
Att'ys for Def't.

[Endorsed :] Supreme Court U. S. 1891, October term. No. 869. The Southern Kansas R'y Company, pl'ff in error, *vs.* J. S. Briscoe. Motion by defendant in error to advance under 32d rule.

[Stamped :] Office Supreme Court U. S. Filed Dec. 21, 1891. James H. McKenney, clerk.

Office Supreme Court U. S.
FILED,
FEB 1 1892
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE SOUTHERN KANSAS RAILWAY CO.,
Plaintiff in Error,

vs.

JEREMIAH S. BRISCOE.

No. 869.

Error to the District Court of the United States for the Western District of Arkansas.

Motion of Defendant in Error to Dismiss the Writ of Error or to Affirm the Judgment; and Brief Thereon.

The defendant in error moves the court to dismiss the writ of error herein, because it has no jurisdiction to hear and determine the same; or to affirm the judgment, it being manifest, that even if the court has jurisdiction, the question on which the jurisdiction depends is so frivolous as not to need further argument.

A. H. GARLAND,
H. J. MAY,
For Defendant.

Congress by act of July 4, 1884 (chap. 179, 23 St., p. 73), granted the right of way through the Indian Territory to the Southern Kansas Railway Company. By the 8th section of this act, the United States Circuit and District Courts for the Northern District of Texas, the Western District of Arkansas, and the District of Kansas were given jurisdiction, without reference to the amount in controversy, over all controversies arising between the inhabitants of said nations and said railway company, etc. (*23 St., p. 75.*)

The defendant in error, being the owner of a livery stable at Purcell, complained in the court below, as an inhabitant of such Territory—Chickasaw Nation—that the railway had killed some of his horses, etc., and to this complaint the railway company appeared and pleaded several matters, and among them, that Briscoe was not an inhabitant of that Territory as alleged. A trial was had and resulted in a verdict for Briscoe to the amount of $896.75, and judgment was rendered therefor with interest, etc.* (Rec., 7, original.)

* See case reported 46 Fed. R., 273.

The railway company brings error to review this case.

It will be observed, in the beginning, that the act referred to, upon which alone this proceeding is founded, gives no right of review in the controversies named; and it would seem, the act made these courts alluded to special tribunals to settle finally all *controversies*, etc. Of course controversies had to arise about taking and condemning lands, and it was considered wise, by Congress, to put these and all others in these courts for final determination, and this being so, and no review provided for this special jurisdiction, the judgment here must be conclusive. *Commissioners* v. *Aspinwall, 21 How., 539; Freem. Judg.* (3d ed., § 524).

It is, therefore, by no means certain, that the act of

February 25, 1889 (ch. 236, 25 St., p. 639), which gives the general right of review from Circuit Courts, without reference to the amount involved, where the question of the jurisdiction of the court is presented, embraces this class of cases.

Should it be deemed, however, this latter act (February 25, 1889), is sufficient to give the review here sought, of course the review must be limited to the jurisdictional question alone.

The complaint in the cause states specifically that Briscoe was, at the time mentioned, an *inhabitant* of the Chickasaw Nation, where the property named was. The plaintiff in error raised no issue on this separately, but in answer, denying Briscoe's allegations generally, denied this too, and this went to the jury as one of the disputed facts, and their finding on it is conclusive here.

Lancaster v. *Collins, 115 U. S., 222;*
Waterville v. *Van Slyke, 116 Ib., 699;*
Wilson v. *Everett, 139 Ib., 616.*

Two very vague efforts were made by plaintiff in error, to get the question of inhabitancy before the court, outside of the allegations in the complaint and the answer, by instructions 3 and 12 asked for (Rec., 93-96, original). But these instructions requested the court to tell the jury explicitly *Briscoe was not an inhabitant, but he was a trespasser in the nation with his property.* This the court could not do, as this was nakedly a question of fact for the jury, which was left to them to pass on and they did pass on it; *Scott v. Lloyd, 9 Pet., 418; Railroad Co. v. St., 17 Wall., 657;* and whatever alleged error or irregularity there may be, it is cured by the verdict; it was a verdict on all the issues, and therefore, equivalent to a special verdict on each and all the issues tried.

Flournoy v. Lastrapes, 131 U. S., app., CLXI;
Glenn v. Sumner, 132 Ib., 152.

The act of July 4, 1884, as to a settlement of the controversies named in section 8 is without meaning and purpose if this comes not in that category, and the attempt to raise a jurisdictional question on it, irrespective of the amount, comes so close to the frivolous, the line of distinction or demarkation is scarcely visible to the naked eye.

Respectfully,

A. H. GARLAND,
H. J. MAY,
For Defendant.

WASHINGTON CITY, D. C., *January 9, 1892.*

To A. T. BRITTON, A. B. BROWNE, and GEORGE R. PECK, attorneys of record for plaintiff in error in the above-entitled cause:

You are hereby notified, that as such cause has been advanced under Rule 32 of the Supreme Court of the United States for hearing, the defendant in error will, on Monday the 1st day of February next, on the meeting of such court, on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the foregoing motion, and their brief thereon hereto attached.

Very respectfully,

A. H. GARLAND,
H. J. MAY,
For Defendant.

Office Supreme Court U. S.
FILED,
FEB 1 1892
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE SOUTHERN KANSAS RAILWAY COMPANY,
Plaintiff in Error,
vs.
JEREMIAH S. BRISCOE.

No. 869.

In Error to the District Court of the United States for the Western District of Arkansas.

Brief in opposition to motion to dismiss or affirm.

GEO. R. PECK,
A. T. BRITTON,
A. B. BROWNE,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE SOUTHERN KANSAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

JEREMIAH S. BRISCOE.

No. 869.

In Error to the District Court of the United States for the Western District of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a suit brought in the Court below by defendant in error as an alleged inhabitant of the Chickasaw Nation, Indian Territory, to recover damages for wrongful killing of certain live-stock on the railroad of plaintiff in error therein. (Rec. 1.) On issue and trial, verdict and judgment were rendered against plaintiff in error for $896.75. (Rec. 4.) Motion for new trial was overruled (Rec. 13), and the cause is brought to this Court on denial of juris-

diction of the Court below, pursuant to the Act of February 25, 1889. (25 Stats. p. 639, ch. 236.) Because lacking in jurisdictional amount, this is the sole question reviewable here.

The opinion of the Court below is found at large in Federal Reporter, Vol. 40, p. 273.

ASSIGNMENT OF ERRORS.

The Court below erred in entertaining jurisdiction of this cause, both as to parties and subject-matter.

ARGUMENT.

I.

The Act of Congress approved July 4, 1884 (23 Stats. p. 73, ch. 179), granted the plaintiff in error the right of way through the Indian Territory. Sections 1 and 2 thereof define the route of the road and the extent of the right of way. Section 3 provides for compensation for any property taken or damage done individual occupants, by either amicable agreement or by the award of referees with right thereafter to resort to the Courts. Section 4 provides for regulating the rates for freight, passenger, and mail service. Section 5 provides a distinct sum per mile to be paid for such right of way to the nations or tribes, with subsequent provision for award by referees, and final resort to the Courts in the event that such nations or tribes should not accept the amounts named in the Act. Section 6 requires maps showing the line of the Company's road to be filed with the Secretary of the Interior and with the principal chief of each Nation or tribe through whose lands the road may be located, and for

approval of such location by the Secretary of the Interior antecedent to construction. Section 7 of the Act permits the railroad officials and employés to reside upon such right of way when engaged in the construction and management of the railroad, subject to the intercourse laws and executive regulations thereunder. Section 8 confers upon named Federal Courts jurisdiction of controversies arising under the Act. Section 9 requires construction of prescribed mileage within fixed date to avoid forfeiture of the right granted. Section 10 provides for the acceptance of the grant or right of way upon the express condition that the Company, its successors or assigns, should not in any manner attempt to change the existing Indian title nor to secure from nations any further grant of land or occupancy right than as provided in the Act, under pain of forfeiture of the charter privileges thus conferred. Section 11 requires all mortgages executed by the Railroad Company to be recorded in the Department of the Interior, and such record thereof to be evidence and notice of their execution, and as conveying all rights and property of said Company as therein expressed.

Section 8 of this Act reads as follows:

"That the United States Circuit and District Courts for "the Northern District of Texas, the Western District of "Arkansas and the District of Kansas, and such other "courts as may be authorized by Congress, shall have, "without reference to the amount in controversy, concur- "rent jurisdiction over all controversies arising between "said Southern Kansas Railway Company and the nations "and tribes through whose territory said railway shall be "constructed. Said courts shall have like jurisdiction, "without reference to the amount in controversy, over all "controversies arising between the inhabitants of said "nations or tribes and said Railway Company, and the "civil jurisdiction of said courts is hereby extended within

" the limits of said Indian Territory, without distinction " as to citizenship of the parties, so far as may be neces- " sary to carry out the provisions of this Act."

In the Court below it was contended on behalf of plaintiff in error, that the last clause of this section, to wit, "*so* " *far as may be necessary to carry out the provisions of this* " *Act*," is a limitation upon the jurisdiction thereby conferred to such controversies as might arise between the nations or individuals involved in the construction of said Railroad Company, as pertaining to the right of way, and damages for land, improvements, or occupancy rights thereby injured or disturbed, &c. The Court below overruled this contention, and held that the foregoing section gives the Courts therein named jurisdiction over all controversies, and in all suits brought by the inhabitants of such territory against the plaintiff in error.

The expressed conclusions of the Court below upon this question may be fairly stated thus:

a. That without the operation of the foregoing statute the inhabitants of the Indian Territory would have no remedy for torts committed by the Railroad Company, because judgment upon torts can only be given when allowed by the law of the place where the injury was committed.

b. That the case at bar involves a cause of action arising under the laws of the United States, and

c. That a suit arises under a law of the United States " when it appears that some title, right, privilege, or im- " munity on which the recovery depends will be defeated " by one construction of a law of the United States or sus- " tained by the opposite construction," and hence the Federal Courts have jurisdiction therein, regardless of the citizenship of the parties.

II.

The injury alleged as the cause of action herein is simply a common law tort, for which action will lie without the aid of any express statute.

"Every wrongful invasion of a legal right, such as the "right to security of persons, the rights of property, or the "rights incident to the possession of property, is in law "an actionable tort; and so of every neglect of legal duty, "and of every wrongful injury to the person or character "of another."

Wait's Actions and Defenses, Vol. I, pp. 4 & 5.

Hence in the absence of express statute, a wrong done to the person or property of an individual by the carelessness or negligence of another gives an action for damages and involves a plain common law right of recovery. Statutes may modify the mode of procedure or the measure of damage, or otherwise *change* the common law rule with respect to the form of the remedy, but in the absence of all such, the right is as secure to the individual under the common law as if reaffirmed in broadest terms by legislative enactment. Furthermore, the right is personal and not capable of assignment. Where the injury or wrong suffered is plainly within the remedy of the common law, the plaintiff may institute suit in any court having common law jurisdiction, and where jurisdiction of the person of the defendant may be secured by process from such Court. If Section 8, *supra*, were entirely obliterated from the statute it would not take away the common law remedy for the wrong here alleged, nor the right to pursue that remedy in any court where jurisdiction of the person of the defendant could by its process be secured. Hence the provisions of Section 8 neither enlarges nor diminishes the

right of action in cases of this nature, nor can any just construction thereof limit the right of suit for such character of injury to the Federal Courts named therein.

III.

The plaintiff in error (defendant below) was and is a corporation created and existing under the laws of the State of Kansas. Its road was constructed through the Indian Territory under the express permission of a Federal statute, but such statute did not change the character of the corporation nor invest it with any additional powers *as a corporation* beyond those already possessed by it as a creation and corporation of the State of Kansas. It is undeniably true that in exercising the privilege of construction and maintaining a railroad in the Indian Territory, it must do so in subordination to the laws of the United States which apply therein, in so far as the construction, maintenance, and operation of its road alone is concerned. But the provisions of Section 8, with respect to controversies cognizable in the Federal courts therein named, must be limited both upon principle and authority to those causes of action which affect the powers exercised under the Federal laws granting this right of way, *and to those alone.* Hence we may well maintain the sound construction of Section 8 to be, that the words "all controversies" are necessarily subject to this dominating principle as expressed in the concluding words of the section, to wit: "*so far as may be necessary to carry out the provisions of this Act.*"

The provisions of the Act as hereinbefore recited contemplated the right to construct and operate a railroad, and to pay the Indians for all property taken or destroyed therein. Nowhere in the Act is there any attempt or sug-

gestion to subordinate this Railroad Company to any Federal law or statute, except in regard to the specific matters and things connected with the grant of the right of way for the construction of the road therein. Thus limiting the operation of Section 8, there is still abundant room for just exercise of the jurisdiction by the Federal Courts therein named of all controversies arising between the Railroad Company and the nations or inhabitants of the Indian Territory. By Section 3 resort to such Courts is authorized to determine all questions of values of damages done, property taken or destroyed in the construction of the road. By Section 6, upon filing of the maps of definite location, "no claim for a subsequent settlement and im-" provement upon the right of way shown by said maps " shall be valid as against said Company." By Section 9, the Company is required to "construct and maintain con-" tinually all road and highway crossings, and necessary " bridges, over said railway wherever said roads and high-" ways do now, or may hereafter, cross said railway's " right of way, or may be by the proper authorities laid " out across the same."

These citations are given to illustrate the full field of jurisdiction open to the operation of Section 8. They distinctly cover subject-matter open to dispute and subsequent judicial controversy. The jurisdiction conferred by Section 8 extends justly to these matters of statutory creation, and it is to such matters alone that the clause "so far as may " be necessary to carry out the provisions of this Act" has any just relation. Upon any other construction these words of limitation found in Section 8 are without force or effect. The extension of the civil jurisdiction of the Federal Courts therein named would not necessarily alone create a judicial remedy for wrongs which as matter of original law existed everywhere in this country under the

common law, and it did not need the force of statutory enactment to create a remedy for such wrongs. If the opinion of the learned Court below was sound, then, in the absence of Section 8 from this statute, injuries suffered in this Territory either to person or property would be absolutely without any remedy enforcible in any court. We submit that conclusion can not be accepted. The statute in question was not intended to supplant the ordinary rules of action, nor to create by express enactment in this Territory a remedy for a common law wrong or tort which would otherwise be without existence. To so construe Section 8 is to entirely obliterate the concluding clause thereof, and to hold that the words therein, "all "controversies," must stand without limitation so far as such concluding clause may have effect thereunder. Statutes are not thus to be construed, and hence it may well be claimed that the extension of the jurisdiction of Federal Courts over this Territory "so far as may be necessary to "carry out the provisions of this Act" must be limited to the plain objects of the Act, and not as thereby *creating* a statutory remedy for natural wrongs enforcible in any judicial tribunal. To emphasize the argument, we repeat that Section 8, relied upon as supporting the jurisdiction of the Court below, did not *create* a remedy for natural wrongs, nor could it be intended to compel suitors seeking redress therefrom to proceed only in the Federal Courts therein named. The territorial jurisdiction of such Courts was in terms extended over this Territory, because of the questions requiring judicial determination, which would necessarily arise, consequent on the grant of this right of way and its subsequent exercise. The contrary doctrine held by the Court below would in effect declare that as between individuals in this Territory, not Indians, natural wrongs of this character were without remedy, because of

the absence of judicial forum wherein they could be lawfully redressed.

IV.

The cause of action herein is not one "arising under a "law of the United States," as the Court below erroneously declares. The sole suggested test thereunder given in the opinion below, that the right of recovery herein depends upon and will be defeated by construction of the Federal law or sustained by the opposite construction, has no possible application to the case at bar. It erroneously assumes as the premise the entire lack of judicial remedy anywhere for a common law tort, such as the nature of the case at bar, and the creation of a suitable remedy therefor by this act granting the plaintiff in error the right of way through this Territory. But natural wrongs of this nature do not involve a "title, right, privilege, or "immunity" arising under the provisions of a Federal statute; nor is the party injured driven to a suit in the Courts named in Section 8 of this right-of-way Act to recover damages for the wrong and injury done him. If the right to sue were dependent exclusively upon a Federal statute. the case would be within the reasoning and conclusion expressed by the Court below. But it is plainly otherwise. Suits of the nature here involved are not within the language, the spirit, or the intention of Section 8 of the right-of-way Act. By that Act, Congress had delegated the right to exercise the power of eminent domain to this railroad corporation, and in controversies between that corporation and the tribe or individual, has provided special tribunals for the judicial enforcement of rights and remedies connected with the exercise of this attribute of sovereignty, to wit, the taking of private property for a public use.

"Where a limited jurisdiction is conferred by statute, "the construction is strict as to the *extent* of jurisdiction, "but liberal as to the *mode* of proceeding."

Sutherland on Statutory Construction, sec. 435, p. 561.

V.

This closing limitation to Section 8, it seems to us, undoubtedly limits the jurisdiction of the Federal Courts to such controversies as may arise beween the tribes or nations through whose territory the road is constructed and the inhabitants of such tribes and nations to matters *necessary* "to carry out the provisions of the Act;" in other words, it limits it not only to suits between the tribes and nations, or members of the tribes and nations, and the Railroad Company, but it limits it even in those cases to such causes of action as may arise under the act granting the right of way, and can by no possibility, even as to the tribes or nations through whose territory the road is constructed, or the inhabitants or members of the tribes and nations, be extended or applied to an action founded upon a common-law tort, a recovery upon which depends in no manner whatever upon the construction of the Act granting the right of way to the Railroad Company. The jurisdiction conferred refers to controversies between said parties growing out of and arising from the grant of the right of way, and the taking of the property of the tribes or the members thereof. It is impossible for us to conceive of any cause of action of which such Courts would have jurisdiction under the provisions of Section 8 of the Act, unless it be some action directly or indirectly connected with the acquirement of lands upon which to construct the road through the Territory. If the act is construed as we claim it must be, it would then be constitu-

tional under the provisions of the second section of Article 3 of the Constitution of the United States, giving to the Federal Courts jurisdiction in all cases in law and equity arising under the laws of the United States. But if it should be held that the language of the Act is broad enough to include actions founded upon tort committed in the Indian Territory, upon the persons or property of inhabitants of the Territory, it would then be clearly unconstitutional, as Congress has no power to confer upon the Federal Courts jurisdiction in excess of that provided for by the Constitution. The judicial power is defined and necessarily limited by the Constitution.

In the case of *New Orleans* v. *Winter* (1 Wheaton, 91), the Supreme Court of the United States decided that the Federal Courts did not have jurisdiction between a citizen of a Territory and a citizen of a State, and in *Hepburn* v. *Ellzey* (2 Cranch, 445) and *Barney* v. *Baltimore* (6 Wall. 280) the same Court decided that the Federal Courts had no jurisdiction in suits between citizens of the District of Columbia and citizens of a State. It is true that in deciding these cases the opinion of the Court was based entirely upon a construction of the language of a statute, and not upon the section of the Constitution. But it will be noticed that the language of the statutes which the Supreme Court construed was identical with the language used in the Constitution. If, therefore, the Federal Courts had not jurisdiction in a case between a citizen of a Territory and a citizen of a State under a statute using the same language as used in the Constitution, then it would be beyond the power of Congress to confer upon a Federal Court jurisdiction in causes between a citizen of a Territory and a citizen of a State, as Congress can confer no jurisdiction not authorized by the Constitution itself.

Section 1 of Article 3 of the Constitution vests the judidicial power of the United States in one Supreme Court and in such inferior courts as Congress may from time to time establish. Section 2 of Article 3 of the Constitution then provides to what classes of cases the judicial power of the United States shall extend. It is, therefore, beyond the power of Congress to confer upon any of the Federal Courts jurisdiction not specified as judicial power by the Constitution.

In the Pacific Railroad removal cases (115 U. S. on page 12) the Court uses the following language:

"Now, suits by or against the United States Bank "could not possibly, as such, belong to any of these "classes except the first, namely, cases in law and equity "arising under the Constitution, laws, or treaties of the "United States; and the Supreme Court as well as the "distinguished counsel who argued the Osborn case so "understood it. Unless, therefore, a case in which the "Bank was a party was, for that reason, a case arising "under the laws of the United States, *Congress would not* "*have had the power to authorize it to sue and be sued in* "*the Circuit Court of the United States.*"

See the case of *Osborn* v. *Bank of the U. S.*, 9 Wheat. 738.

If this be correct law and Congress has no power to confer upon the Federal Courts jurisdiction over cases by or against the United States Bank, except so far as the cause of action arises under the Constitution, laws, or treaties of the United States, then it has no power to confer jurisdiction upon the Federal Courts in causes between a citizen of a Territory or an inhabitant thereof and a citizen of a State.

There is no allegation in plaintiff's petition that this is a controversy arising between citizens of different States,

or under the Constitution, laws, or treaties of the United States, nor any other of the several causes of which, under the Constitution, the Federal Courts might have jurisdiction. In the case at bar the cause of action is purely one of tort under the common law, and no constitutional provision, law of Congress, or treaty is in any manner pertinent to the questions involved, or the right of the plaintiff to recover. We claim, therefore, that the construction which we have placed upon the 8th section of the Act, limiting it to controversies arising under the Act as stated in the last clause of the section, and between the nations and tribes through whose territory defendant's railroad is constructed, or the inhabitants of said nations or tribes, is the only construction which the Act will bear without being in conflict with the Constitution of the United States. The cause of action, therefore, in this case, founded as it is upon a tort alone, and not involving the construction of any law or treaty of the United States, is not within the jurisdiction of the Federal Courts, and Congress had no power to confer upon them jurisdiction over this class of cases.

The whole line of decisions of the Supreme Court of the United States in similar cases bears out the construction which we have placed upon the Act in question. The Constitution confers jurisdiction upon the Federal Courts in cases between "a State or the citizens thereof and foreign "States, citizens, or subjects." And, under this section, the Supreme Court has decided that the Federal Courts have no jurisdiction in suits between aliens; in other words, in order to confer Federal jurisdiction one of the parties must be an alien and the other party a citizen.

Mantalet v. *Murray*, 4 Cranch, 46.

Mossman v. *Higginson*, 4 Dallas, 12.

The Constitution also confers jurisdiction upon Federal Courts in suits between a State and a foreign State. Under this section the Supreme Court has held that an Indian tribe or nation is not a foreign State, and therefore the Federal Courts could not take jurisdiction.

Cherokee Nation v. *State of Georgia*, 5 Peters, p. 1.

Therefore an inhabitant of an Indian tribe would not be the subject or citizen of a foreign State, and could not sue the citizen of a State in the Federal Courts. Jurisdiction is not given by the Constitution to the Federal Courts over such a suit, and it follows that Congress could not confer such jurisdiction.

It therefore evidently was not the intention of Congress to give this Court jurisdiction over a suit of this nature, it being a well-settled principle that acts of legislative bodies will be so construed by the Courts as to make their applications constitutional where it is possible to make such construction.

VI.

In submitting argument upon the pending motion to dismiss or affirm, opposing counsel plainly shoot wide of the mark by inferring our contention to be that the defendant in error was *not* an inhabitant of the Territory within the meaning of Section 8 of the right-of-way Act. But this case is not brought to this Court upon any such ground, nor to determine the question of the effect of the lease of the road by the plaintiff in error to the Atchison, Topeka and Santa Fé Railroad Company. We conceive that the proposition upon the question of jurisdiction, as above submitted is both meritorious and fully justifies presentation here. The plaintiff in error is a corporation of the State of Kansas; its offices are located there, and

the courts of that State are open to suitors for the enforcement of these common law remedies for these natural wrongs. In such cases it is a matter of hardship to require this Company to appear before a Federal Court in another State far distant from both the residence of the original plaintiff [redacted] and the headquarters of the Railroad. It is not believed that Congress intended any such result or desired to impose this great inconvenience and hardship. Concurrent jurisdiction over the cause of action within the scope and limitation of Section 8 of the right-of-way Act, whilst exercised in any one of the three Federal Courts therein named, does not need to be extended to mere common law remedies, which would exist in the entire absence of the provisions of Section 8 and be enforcible in courts of such jurisdiction where the plaintiff in error could not properly deny its jurisdictional powers.

We therefore submit, that upon the question of jurisdiction herein presented the Court below erred in its conclusion. We accordingly ask that the judgment below be reversed.

Respectfully submitted.

GEO. R. PECK,
A. T. BRITTON,
A. B. BROWNE,
Attorneys for Plaintiff in Error.